No. 12510

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
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Proctors for Appellant.

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FRAYN PRINTING COMPANY

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I.

WHAT IS THE ISSUE?

A reply is in order.

We said in the opening brief that the evidence, wholly and impartially viewed, does not support the Court's finding that the flour in question was wet with seawater when lifted from the holds of the "SWEEPSTAKES" at Rio. (Aps. 357)

Appellee declines to discuss this issue. Instead,

it states another "question" (Br. 5)—to which there has been only one answer since *Clark v. Barnwell,* 12 How. 272, 13 L. ed. 985—and cites a host of cases all presupposing actual damage on outturn. Throughout its argument, Appellee identifies these cases with the one at hand, as though they dealt with the same question. See, for example, treatment of *The Ciano* on page 8 of Appellee's brief.

Such a muddling of the focal issue can only distract the Court.

To make the point clear, we briefly summarize the cases relied upon by Appellee, in order of citation:

United States v. Apex Fish Co. (CA, 9), 177 F. (2d) 364, 1949 A.M.C. 1704: Concealed damage to salt herring, found to have been in good condition at time of loading. "That (the herring) outturned at Seattle in a damaged or deteriorated condition is unquestioned." 1949 AMC, 1704.

The Astri (CA, 2), 151 F.(2d) 5, 1945 AMC 1064: Iron plates being discharged at Buenos Aires were seen by consignee's employee and a tally clerk to be wet with acetic acid, which had leaked from a drum stowed over the iron.

The Medea (CA, 9), 179 Fed. 781: "On arrival of the bark at San Francisco, it was found that much of the cargo had been damaged by salt water * * *."

The Folmina, 212 U.S. 354, 29 S. Ct. 363, 53 L. ed. 546: "* * * when discharged in New York, a large part of it (bags of rice) stowed on the starboard side of the hold was found damaged." 212 U.S. 360.

The Ciano (E.D.Pa.), 69 F. Supp. 35: "When the paprika was discharged at Philadelphia, 235 of the 500 bags were found to have been damaged" (stained and discolored). (36, 37)

The Lassell (EDNY), 53 F.(2d) 687, 1925 AMC 1066: "When the said steamship arrived at New York and was unloaded, the linseed, some of which was in bags and some in bulk, and stowed in the bottom of Hold No. 1, was found badly damaged by sea water. In fact, it seems beyond dispute, that there was a large quantity of sea water then in the hold and that this had caused the damage. The question litigated was, how did this water get into the hold?" 1925 AMC, 1066.

George A. Pickett (SDNY), 77 F. Supp. 988, 1948 AMC 453: "When * * * the cargo was discharged, it was found that 32 bales (kid skins) out of the 265 delivered were 'in a wet and stained condition'." (453)

Schnell v. The Vallescura, 293 U.S. 296, 55 S. Ct. 158, 79 L. ed. 367, 1934 AMC 1573: "Apparently good when shipped, the onions were in an advanced stage of decay when delivered (in New York), and

it is for this that recovery is sought." 1929 AMC, 1410 (SDNY).

It is self-evident that such cases of cargo *damaged on outturn* deal with the burden of proof upon the vessel-owner to show a defense under his bill of lading.

In the case at hand, by contrast, the bags of flour were discharged onto rail cars at the dock[1] in apparent good order and condition. (Evidence summarized in opening brief, pp. 15-19.)

Additionally, consignee gave no notice of damage until March 2, seven days after the last of the flour was delivered from the vessel. (Aps. 64, 217) There was full opportunity for consignee to ascertain damage immediately on outturn.

In this circumstance, Section 3 of the Carriage of Goods by Sea Act applies.

> "(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of

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[1] The cars were supplied by the Port Administration (Aps. 60, 81, 219), apparently on the order of consignee (Aps. 60, 218, 219). At any event, the flour was then beyond the control of the vessel, and delivered with the same effect as though it were delivered to Customs directly. (Aps. 219, 221)

Delivery of ocean cargo to Brazilian customs is the practice, as implied by witnesses Caswell and de Camargo and appellee's attorneys. (e.g. Aps. 329) The effect thereof as delivery to consignee was established as early as *The Asiatic Prince* (CA, 2) 108 Fed. 287, cert. den., 183 U. S. 697, 22 S. Ct. 933, 46 L. ed. 395.

The bills of lading provide: "The responsibility of the Carrier in any capacity shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of Customs or other authorities." (Clause 12, Ex. 1)

> the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading." 46 U.S.C. §1303(6).[2]

It is in such circumstances that we say: consignee must have proved by a preponderance of the evidence that the flour was wet when discharged. It is this question of *sufficiency of proof* which is the focal issue in the case.

II.

REPLY TO APPELLEE

A. WAS FLOUR WET WHEN DISCHARGED?

1. LIBELANT'S BURDEN OF PROOF.

Respondent denied that the flour was wet upon delivery. Libelant had to prove it to make out a case.

> "The burden of proof, as a principle of general jurisprudence, is assumed by the libelant unless the cause of action is confessed or admitted judicially by the respondent." 1 Am. Jur. 604, Admiralty, §109, adopting language of *The L. P. Dayton,* 120 U.S. 337, 7 S. Ct. 568, 30 L. ed. 669.

This principle of course applies to cargo damage claims. *The Dondo* (SDNY), 287 Fed. 239: "The shipper must show damage while in the carrier's hands and it is only an excuse, e.g., an exception

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[2] The identical language of Clause 18 of the bills of lading. (Ex. 1)

in the Bill of Lading that the carrier must allege and prove."

Pan-American Hide Co. v. Nippon Yusen Kaisha (SDNY), 13 F.(2d) 871, per Judge Learned Hand: "The libelant has that burden (of proof) on the issue whether the goods were damaged in the carrier's custody."

A specific illustration of this principle is *Globe Distributing Co. v. S.S. Monte Iciar* (E.D.Pa.), 67 F. Supp. 201, 1946 AMC 1354.

Barrels of Spanish wine were discharged from the ship at Philadelphia. The dunnage and floors of the holds were found clean and dry. None of the barrels were observed to be leaking during discharge. When they arrived in Baltimore, by rail, some of the barrels were leaking badly.

Libelant in that case made the same argument here advanced—that the burden was upon the respondent to explain or excuse the damage under one of the exceptions in the Carriage of Goods by Sea Act. (1359)

The Court rejected such contention.

> "How, then, do the facts of the instant case bring it within the purview of the Carriage of Goods by Sea Act? This libel is based upon the loss of contents from certain barrels of wine. There is no evidence that the barrels were leaking at the time they were loaded aboard ship. If, as is frequently the case, the loss had been apparent upon discharge of the cargo, I would have no doubt that the Carriage of Goods

by Sea Act would govern respondent's liability. However, in the instant case, there is no evidence whatever of any loss of contents or damage to the barrels at the time they were discharged. An inspection of the 'tween decks, where libelant's cargo had been stowed, showed that that space was clean and dry.

"The first evidence of any loss of contents from libelant's shipment was the gauging of seven of its barrels on the pier by the United States Customs authorities on April 17, 1944, at the time the shipment was delivered to libelant's agents, which was four or five days after the discharge of the cargo. I do not think that these facts alone bring libelant's loss within the purview of the Carriage of Goods by Sea Act."

2. CONFLICTS IN ARGUMENT.

REPRESENTATION.

Appellee commences its argument (Br. 6) with the suggestion that it was not represented at discharge from the "SWEEPSTAKES." Its own evidence shows that it paid Cr.$ 3,973.80 for "discharge checking expenses." (Aps. 122)

What are checkers for? To count the outturn, and note any apparent damage. This is common practice the world over, as Appellee very well knows. It is proved in this case (testimony of Caswell, answer to 18th interrogatory, Aps. 221). Unlike practice in the United States, the notation of damage upon discharge is *required by the customs laws,* in Brazil (testimony of de Camargo, Aps. 324).

THE WEEK-LONG RAIL JOURNEY.

Appellee next tries to gloss over the absence of evidence as to what happened to the flour during its rail carriage. It speaks of "ample, uncontradicted testimony" (Br. 9)—but makes no reference to the Apostles. The *only* testimony is of checker Luiz, who said: "I played a very small part in unloading this shipment. I supervised the removal of only part of a shipment, say a carload on the entire shipment." (Aps. 54, 55) "I saw only one wagon." (Aps. 55)

He said directly: "I don't know" whether the shipment was damaged by rain. (Aps. 57)

It *did* rain while the flour was in the open cars. (Exhibit A-1, deck log book, entries at Rio, February 21—heavy shower, light to heavy rain, very heavy rain; February 22—rain; February 23—rain.)

Caswell stated as his surmise, from the facts: "Such damage could have been caused through flour becoming wet while waiting in rail cars, through faulty tarpaulins, or through consignee's discharging at their deposit in rain." (Aps. 225, 227)

The surveyor Gow testified, as opinion, from a description of the damage, that bags spotted to various degrees implied "a sprinkling condition." (Aps. 272)

BEGGING THE QUESTION.

We next comment upon the argument starting top of page 10. We of course do not believe that 61,250 pounds of flour were saturated—that is what the Court charges against the Appellant. Nor do we say all the damage came from the possible sources referred to on page 30 of our opening brief. We sought there only to suggest that salt does not inevitably mean sea water. Barreto examined two samples (if his report is believed) or six samples (if his latter-day testimony is believed). These samples were inadequate to represent the whole. (Aps. 296) Appellee yet persists in referring to "salt water damage" (Br. 6) and "liability where damage by salt water has been proved" (Br. 10) and "damage to flour proved to have been due to salt water contamination" (Br. 10, 11) and "damage which Appellee has affirmatively proved to have been caused by salt water contamination of the flour" (Br. 13) as though by weight of words it could overcome its dearth of facts.

BARRETO'S VERACITY.

Appellee says we "attack" its chemist's report. (Br. 13) We did not. We compared Barreto's report with his testimony, without comment. (Our brief, pp. 27, 28) The shoe pinched maybe.

But when Appellee cites Punnett and Williams as

supporting Barreto (Br. 14) we draw a line.

All *three* chemists testified that the Barreto report did *not* reflect a quantitative analysis.

Punnett:

> "I can only form an opinion, if quantitative figures had been submitted by Dr. Barreto as to the amounts of sodium chloride present. *The original report indicates that only qualitative tests were made.* In the subsequent deposition he states he made quantitative determinations. The interpretation of those determinations will depend upon the relation of the quantitative results as expressed in figures, usually in percentage." (Aps. 311, 312)

Williams:

> "This is a qualitative analysis." (Aps. 238) I cannot tell from the report whether the damage in this case was due to sea water "because of the lack of quantitative data to support such a conclusion." (Aps. 246)

Owens:

> "Q. In Dr. Barreto's report, which you say you have examined, based upon what you see in that report, namely, his statement, 'The analysis made on two samples of wheat flour * * *,' with the marks so and so, 'gave the following result,' and he lists 'Chlorites * * * Presence, Sulfates * * * Traces,' and so on, would you say from that report Dr. Barreto had made a quantitative analysis?
> "A. No, sir.
> Q. He did not make a quantitative analysis?
> "A. Not on the basis of what that says, no."

It was this failure to put his results in proper form (if Barreto did make quantitative and com-

parative analyses, as he says[3]) which provoked criticism by Williams and Punnett.

Punnett:

> "I would say that any other chemist or consultant would be unable to decide whether or not Dr. Barreto's conclusion was justified unless Dr. Barreto had submitted the actual results of his quantitative determination. I would assume, as a matter of general professional practice and custom, that Dr. Barreto had these figures in a notebook or some other record, and that he could have submitted the figures." (Aps. 313, 314)
> "I certainly would feel that in such a case, even though Dr. Barreto was not acting for any governmental bureau or department, it would be essential and good professional conduct to retain the figures and records of his actual determination." (Aps. 315)

Williams:

> "* * * My opinion is that competency would necessarily include quantitative data in order to support his conclusion. Presumably, Dr. Barreto has testified that he did conduct quantitative data. My only opinion is, why didn't he report it? In any legitimate report, in my own experience, it is necessary to prove what you have to say, and our only proof in analytical chemistry is by the presentation of quantitative data. That is our only way of proving anything we say." (Aps. 254)

If the Court please, this is a matter of elemental scientific method. Julian Huxley levels precisely the

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[3] Appellee's witness Ramos testified—"I do not think such an examination was made" (quantitative analysis of damaged and sound flour). (Aps. 78)
He further testified that he did not believe *any* analysis was made of the sound flour. (Aps. 77)

same complaint against Trofim Lysenko, the Russian biologist:

> "I at first imagined," writes Dr. Huxley, "that there might be something in Lysenko's claims. However, the more I heard and read, the clearer it became that Lysenko and his followers are not scientific in any proper sense of the word—they do not adhere to recognized scientific method, or employ normal scientific precautions, or publish their results in a way which renders their scientific evaluation possible." (From Huxley's "Heredity East and West," as quoted in *The Seattle Times*)

The above sketch of chemists' testimony shows the reason for Appellee's digression to build up Barreto. The whole flimsy structure of the trial Court's speculation stands upon the supposed integrity of Barreto.

The matter is not relevant to our argument (as the Court will note from our brief, p. 29)—we assumed all that Barreto said, namely, that 6 of the 3,087 damaged bags were in contact with salty water at some time before being sampled.

B. WHETHER EXPERIENCE OF THE VESSEL ON THE PRECEDING AND SUCCEEDING VOYAGES IS RELEVANT TO THE ABOVE ISSUE.

Nothing in the answering brief appears to require a reply. Neither the trial Court nor Appellee seem to grasp the distinction between circumstantial evidence and proof.

C. NOTICE OF SURVEY.

It seems to us that the facts stated in our opening brief speak for themselves.

D. EXTENT OF DAMAGE

We made no conscious effort to discredit the witness Ramos. We stated the facts. (Our brief, pp. 41, 42) The facts seem to embarrass Appellee.

Appellee represents to the Court that "Ramos was an *independent* surveyor." (Br. 23, emphasis theirs)

What does Ramos say?

> "When merchandise insured by our company arrives damaged, I survey it." (Aps. 67)

He describes the damage.

> "An additional 197 bags were torn but not damaged by water. These bags were not considered because they were not covered by the insurance." (Aps. 68)

Ramos dickered with Cia. Luz to settle this loss. (Aps. 75)

We respectfully submit that he was *not* an "independent surveyor." He made no claim to experience with flour salvage, or to knowledge of costs of reconditioning. He made no effort to determine *actual* disposition of the 3,087 bags of flour. He did *not* take the necessary steps to establish an accurate estimate of loss. Our opening brief covers the matter, pp. 43, 44, 45.

Barreto the chemist is drawn in to double as a surveyor. (Br. 23, 24, 27) His qualifications as such do not appear in the record.

Lastly, Appellee purports to answer the demand for data on reconditioning by implying the flour was thrown away! (Br. 25) Of course the damaged flour was thrown away. It was segregated from the great mass of good flour in the 3,087 bags. The good flour was rebagged and sold by Cia. Luz. (Aps. 104, 112, 119)

How *much* flour was re-bagged?

How much did it *cost* to segregate the good flour and re-bag it?

This is the real measure of Appellee's loss.

E. EVIDENCE OF MARKET VALUE.

Appellant made no such stipulation as is claimed by Appellee on page 28.

The record, which Appellee did not quote accurately, speaks for itself.

III.

ADDENDUM

Our opening brief states that the holds in question contained 2,315 sacks of flour consigned to others. (Br. 10) This was an inadvertent error.

We also emphasized that there was *no* flour or

other cargo water-damaged on this voyage. (Br. 16, 17, 18)

To give the Court a clearer picture of the cargo, and its significance upon the focal issue, we respectfully submit the following details of stowage in the holds in question. The sources are Exhibits A-2 (stowage plan) and 2 (hatch lists).

NO. 1 UPPER 'TWEEN DECK HOLD.

1300 BAGS FLOUR (less than 1000 CLS)[4]
4 pkgs. household goods
13 pcs. baggage
28 pkgs. general cargo
78 drs. insecticide
reels wire
steel sheets
tinplate
15 cs. machinery
8 cs. refrigerators

NO. 2 UPPER 'TWEEN DECK HOLD.

5767 BAGS FLOUR (2300 CLS)
490 bags cement
12 unboxed Ford automobiles
tinplate
steel sheets, tubes, pipe, bars, springs

NO. 3 UPPER 'TWEEN DECK HOLD.

2350 BAGS FLOUR (less than 2350 CLS)
2086 bags mail
1147 pkgs. special cargo

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[4] The hatch lists show 7425 bags of CLS (Cia. Luz Stearica) and Pillco Fadex flour stowed in various holds under mixed marks. They also show the stowage of 4265 bags of CLS flour only.

For example: The last hatch list (Ex. 2), the only one for CLS flour in No. 1 UTD, shows 1000 bags CLS *and* Pillco Fadex. The number of bags of CLS in No. 1 UTD is conceivably 1 to 999.

The stowage plan shows 1300 bags of flour of all marks stowed in No. 1 UTD.

8 unboxed Ford automobiles
1 unboxed Buick automobile
2 unboxed tractors
48 cs. machinery parts
tinplate

NO. 4 UPPER 'TWEEN DECK HOLD.

7890 BAGS FLOUR (between 3274 and 4465 bags CLS)
66 crts. household goods
70 pkgs. general cargo
60 cs. photo supplies
16 pkgs. agricultural parts
1160 cs. tinplate
877 kegs track pikes
steel beams, sheets, conduit
213 bdls. galvanized iron sheets
ctns. glassware

NO. 4 LOWER 'TWEEN DECK HOLD.

6550 BAGS FLOUR (less than 1575 CLS)
552 rolls newsprint
500 cs. canned milk
50 ctns. shoe polish
128 pcs. frames

In summary, there were 22,857 bags of flour in the five holds mentioned. Of these 10,500 (or 46%) were consigned to Cia. Luz Stearica.

Respectfully submitted,

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